

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34237

ADRIAN MEJIA,)	2009 Unpublished Opinion No. 424
)	
Petitioner-Appellant,)	Filed: April 14, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Cassia County. Hon. Monte B. Carlson, District Judge.

Order denying petition for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Adrian Mejia appeals from the district court's order denying his petition for post-conviction relief. We affirm.

I.

BACKGROUND

Mejia entered a guilty plea to one count of delivery of a controlled substance, I.C. § 37-2732(a)(1)(A), pursuant to a plea agreement. This Court affirmed the judgment of conviction and sentence and the denial of his Idaho Criminal Rule 35 motion for reduction of sentence in an unpublished opinion, *State v. Mejia*, Docket No. 30939 (Ct. App., May 11, 2005). Mejia filed a *pro se* petition for post-conviction relief raising eight claims of ineffective assistance of counsel. The charge in the underlying criminal case arose from the sale of methamphetamine to a confidential informant (CI). The CI was wearing a wire during the transaction, which created an audio recording. During the discovery process in the post-conviction proceedings, Mejia was

informed that the audio tapes were no longer in existence. Mejia filed a motion for sanctions against the state, asking the district court to use the spoliation doctrine and find that the tapes did not implicate him. The court denied the motion after a hearing. The court subsequently held an evidentiary hearing on Mejia's post-conviction petition and denied all of Mejia's claims. Mejia timely appealed from the denial of one of his claims for ineffective assistance of counsel: that his trial attorney was ineffective for failing to listen to the audio tapes and investigate his potential defenses prior to advising him to accept the state's proffered plea agreement.

II.

DISCUSSION

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition

that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

Mejia asserts that the district court erred by dismissing his claim that his attorney was ineffective for failing to listen to the audio tapes of the controlled buy and investigate his defense of innocence.¹ Mejia insists that if his attorney had spent more time reviewing his case and discussing his potential defenses, he would not have entered a guilty plea. At the evidentiary hearing, Mejia and his father both testified that Mejia was not present at his father's apartment the day the CI purchased drugs there. Mejia also testified that the police officers monitoring the CI lost visual contact with the CI while he was inside the building; therefore they could not know which apartment the CI went to when he purchased the drugs. During the course of the underlying criminal case, Mejia was represented by four separate attorneys. The third attorney provided discovery to Mejia, including the audio tapes. Mejia testified that he listened to the tapes, but all he heard was static and squealing. Mejia's fourth attorney admitted at the evidentiary hearing that he could not recall listening to the audio tapes, but knew their contents nonetheless from reading the officers' reports. Mejia's attorney testified that the only way to investigate what took place inside the apartment building was to interview the CI and the officers controlling the buy, but he already knew what they would say based on their written reports. Although Mejia testified he told his fourth attorney that he had an alibi witness, he never identified the witness by name or informed him what the witness would say. After reviewing the discovery with Mejia, the fourth attorney encouraged him to accept the plea agreement offered by the state. During the change of plea hearing, Mejia told the district court he was pleading guilty because he "did sell to a confidential informant."

The district court found that Mejia and his father were not credible witnesses, and that the record directly contradicted Mejia's claims for post-conviction relief. Mejia's fourth attorney

¹ Mejia also asserts on appeal that the district court erred by denying his motion for sanctions. Because the state destroyed the audio tapes prior to the expiration of time for all avenues of appeal, Mejia insists the state acted in bad faith and the court should have inferred that the tapes were not inculpatory. However, Mejia testified that he listened to the tapes and, in essence, found the tapes presented nothing exculpatory. We therefore conclude that the district court did not err by denying Mejia's motion for sanctions.

was aware of the contents of the audio tapes, even if he did not listen to them, and they did not show that Mejia was not present at the apartment. Furthermore, the fourth attorney did not recall discussing an alibi with Mejia or Mejia telling him that he was not present at the controlled buy. These findings are not clearly erroneous. *See Russell*, 118 Idaho 65, 794 P.2d 654. Mejia did not prove by a preponderance of the evidence that his attorney's performance fell outside the wide range of professional norms. *See McKeeth v. State*, 140 Idaho 847, 850, 103 P.3d 460, 463 (2004); *State v. Mathews*, 133 Idaho 300, 306, 986 P.2d 323, 329 (1999). Without deficient performance, Mejia cannot support a claim for ineffective assistance of counsel. The district court did not err by denying Mejia's claim for post-conviction relief.

III.

CONCLUSION

Mejia failed to show by a preponderance of the evidence that his attorney was ineffective for failing to listen to the audio tapes of the controlled drug buy or for failing to investigate his defense of innocence. The district court's findings of fact were not clearly erroneous, and Mejia's claims were refuted by the record. The district court did not err by denying Mejia's post-conviction petition. Accordingly, the order of the district court denying Mejia's petition for post-conviction relief is affirmed.

Chief Judge LANSING and Judge GRATTON **CONCUR**.